Supreme Court, U.S.
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No. 92-1189

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
*Petitioner,*

—v.—

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENTS' OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

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## RESPONDENTS' OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

Respondents[1] oppose the various motions for leave to file briefs *amicus curiae* in this matter. These are not friends of the Court. Most are closely linked organizations, paid consultants, sub-contractors, former employers and other parties related to Petitioner.

The filing of a brief *amicus curiae* prior to the granting of a *writ* without consent of all parties is looked upon with disfavor by the Court. Sup. Ct. R. 37.2. Nevertheless, Petitioner has

[1] Disclosure of parent and subsidiary companies of Respondents pursuant to Sup. Ct. R. 29.1 is found in the Appendix to Respondents' Brief in Opposition.

requested numerous organizations and governmental agencies to file *amicus* briefs. A copy of such communications received by one institution has been forwarded to Respondents. (*See* Appendix A.) In urging potential *amici* to disregard Rule 37, Petitioner stated:

> "Numerous filings, by many independent interests, can be crucial to obtaining certiorari. For each filing made, the Clerk makes a separate, distinct entry on the docket sheet. This entry summarizes the filing and its substance. **The more such filings, the more likely it is that the Court will perceive that the case involves a matter of substantial public interest**".

Memorandum of Richard T. Robol (Counsel of Record), November 9, 1992, at 1. (emphasis added). (*See* Appendix A.) If successful, the effort by Petitioner to flood the Court with unnecessary *amicus* briefs would set a bad precedent. Sup. Ct. R. 37.1.

We note the following with respect to the individual applications to file briefs *amicus curiae*:

(1) The Adjunct Science and Education Association was created by and is supported by the Petitioner, Columbus-America Discovery Group [hereinafter "CADG"]. The director of this project is a sponsor and an advisor to another *amicus*.[2]

(2) Battelle Memorial Institute is a sub-contractor and/or supplier of parts to CADG. It is also the former employer of at least one of the principals of CADG. (J.A. 603.)

(3) Counsel of record for two of the parties seeking *amici* status have stated that their briefs were prepared by CADG's counsel, that one had not read the Fourth Circuit opinion and that submission of the briefs came as a result of solicitation by

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[2] *See Sea History*, Winter 1992-1993, at 1, 48 (National Maritime Historical Society).

CADG.[3] One counsel has admitted that CADG paid for the printing of its brief.[4]

(4) One party has instructed counsel to withdraw its brief. (Appendix B.) Improprieties in obtaining authority to file are alleged. (*See* Appendix C.) Petitioner seeks to have another group adopt this "brief without an *amicus*." (*See* Appendix B.) An attorney who respresents CADG was instructed to withdraw the brief. *Id.*

(5) One counsel claims to represent classes of *amici*. In fact, he represents a few individuals.[5]

(6) Counsel for two of the would-be *amici* failed to contact counsel for Respondents in order to request permission to file a brief *amicus curiae* pursuant to Supreme Court Rule 37.2. Nevertheless, both briefs claim that counsel for Respondents have refused consent.[6]

The various briefs *amicus curiae* bring nothing new to this matter. This is a dispute about ownership of gold. (Pet. App. 6a.) There is no dispute about ownership of artifacts nor about the hull of the wreck. Those belong to the salvor pursuant to the law of finds because they have been abandoned as held by both lower courts. (No owner appeared to claim title.) (Pet. App. 28a.)

The owners of the gold have not abandoned their interest (Pet. App. 31a-34a) and the matter has been remanded for a

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[3] Titanic International, Inc. and Marine Technology Society. Telephone conversations dated February 8 and 12, 1993.

[4] Florida Bar Admiralty Law Committee (withdrawn; *see* Appendices B and C).

[5] Brief of Teachers and Administrators in Secondary Schools, Educational Television, Ham Radio Operators and Others Interested in Public Education, at p. 2.

[6] Explorers Club and Florida Bar Admiralty Law Committee (withdrawn).

trial on the amount of a salvage award. The degree to which historical items have been preserved is a factor to be considered in setting the award. (Pet. App. 35a-36a.) *Amici* admit that the Abandoned Shipwreck Act has no application in this case.

Respondents respectfully urge that the motions to accept the briefs *amicus curiae* be denied.

Respectfully Submitted,

/s/ MARILYN L. LYTLE

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# APPENDICES

# APPENDIX A

TO: FILE
FROM: RICHARD T. ROBOL
DATE: 11/9/92

## MUSEUM AND PRESERVATIONINST CONCERNS IMPLICATED BY FOURTH CIRCUIT'S SS CENTRAL AMERICA RULING

## ISSUES

Several historic preservation and museum groups, as well as states, state attorney generals, scientific and academic groups, are considering filing a brief *amicus curiae* in support of Columbus-America's petition for *certiorari*. Such support is of vital importance to the Group, and could well make the difference between whether the petition for *certiorari* is granted—or not.

In protecting historic preservation interests, three distinct issues arise. First, in light of Supreme Court Rule 37.2— which indicates that, where a party opposes participation of the amicus, the motion for intervention as *amicus curiae* is "disfavored"—how likely it is that the Court will allow intervention of preservationist *amici*? Second, specifically, what kinds of museum and preservationist concerns are implicated by the Fourth Circuit's majority opinion? Third, how broad is concern with the decision among the historic, preservationist and scientific communities?

## DISCUSSION

1. Likelihood and Effect of the Supreme Court Granting Amicus Status to the Groups' Committed to Historic Preservation.

The U.S. Supreme Court will almost certainly grant leave to file as *amicus curiae* to any group that wants to file. Although,

on its face, Rule 37.2 discourages filing of amicus briefs absent consent of all parties, the actual practice is to allow such filings as a matter of course. Indeed, recent clerks for certain justices on the Supreme Court are aware of no instances where leave to file has been denied.

Groups filing *amicus curiae* brief enjoy the advantage of being able to influence the development of case law, without being bound by the final decision. A decision would have no res judicata or collateral estoppel effect on the amicus.

Numerous filings, by many independent interests, can be crucial to obtaining *certiorari*. For each filing made, the Clerk makes a separate, distinct entry on the docket sheet. This entry summarizes the filing and its substance. The more such filings, the more likely it is that the Court will perceive that the case involves a matter of substantial public interest.

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Note

To avoid burdening the Court, only page one of a ten page memorandum is provided. The remaining nine pages of this memo contain arguments which are reflected throughout the briefs *amicus curiae*. The additional nine pages are available on request.

## APPENDIX B

[LETTERHEAD OF NOVA UNIVERSITY]

TELEFAX

To: Marilyn Lytle
William R. Connor III

From: Bob Jarvis (Initialed B.J.)

Re: The Admiralty Law Committee of The Florida Bar

Date: February 24, 1993

Further to our telephone conversation this morning, I write to confirm that I sent a telefax to David Horan and Joshua Morse at 11:30 p.m. last night instructing them to withdraw the amicus brief that had been filed on behalf of the Admiralty Law Committee of The Florida Bar in the *Columbus-America* case. Shortly after our telephone conversation this morning, I spoke by telephone with Mr. Horan and he advised me that the notice of withdrawal was in the process of being filed by Professor Morse.

As I also explained to you when we spoke this morning, Mr. Horan has advised me that the notice of withdrawal will be "coupled" with a notice of adoption of the brief by the Monroe County Bar Association.

cc: David P. Horan
Joshua M. Morse III
Connie Stewart

APPENDIX C

[LETTERHEAD OF SULLIVAN & BOYD]

February 23, 1993

Robert Mark Jarvis, Chairman
Admiralty Law Committee, et al.

Re: Columbus-America Discovery Group, Inc., et al. vs.
Atlantic Mutual Insurance Company, et al.
U.S. Supreme Court Case No.: 92-1189
*Amicus Curiae* Brief of the Admiralty Law Committee

Dear Executive Committee:

I am an admiralty and maritime attorney practicing in Jacksonville, Florida who does not represent any of the parties in Columbus-America Discovery Group, Inc., et al. vs. Atlantic Mutual Insurance Company, et al. I have recently been advised that an *amicus curiae* brief was submitted on behalf of the Admiralty Law Committee to the Supreme Court in that case. My understanding is that the *amicus curiae* brief has been returned by the Clerk of the Court for the purpose of curing certain technical errors and that it has not been officially filed for the Supreme Court's consideration.

I am writing you to strongly urge that the *amicus curiae* brief not be re-filed in this action. It is my belief that the circumstances surrounding the drafting and preparation of the brief create the appearance of impropriety and the appearance that the Plaintiffs in the above referenced case have misused the Admiralty Law Committee to support their position in litigation which is pending before the Supreme Court.

I have spoken with most of you by telephone about this matter and have advised you of my position. However, let me take this opportunity to review the facts known to date:

1. On February 10, 1993, a letter was telefaxed from David Paul Horan of Horan, Horan & Esquinaldo to most but not all of the current members of the Admiralty Law Committee. A copy of the letter is attached hereto.

The letter is signed by David Paul Horan for Robert M. Jarvis, Chairman of the Admiralty Law Committee. The letter fails to disclose that David Paul Horan is counsel for Columbus-America Discovery Group, Inc. Mr. Horan has a $1^1/_2\%$ contingent fee interest in the outcome of the case before the U.S. Supreme Court and is not a member of the Admiralty Law Committee. I have spoken to a number of the members of the committee who feel that they were not adequately informed by the letter of the action that the committee proposed to take.

The letter states that "it is presently intended that unless there is substantial opposition from the members of the Admiralty Law Committee, the *amicus curiae* brief in support of the Supreme Court accepting review will be filed. By telefaxing back your reply to telefax number (305) 294-7822 (Horan, Horan & Esquinaldo) no later than 3:00 p.m. Friday, February 26, 1993 you may indicate your opposition to the brief in support of review."

The letter was telefaxed out to the members of the Admiralty Law Committee late in the day on February 10, 1993 and required a response in less than 48 hours. The letter was not addressed to the individual members of the Admiralty Law Committee and those firms which had numerous members received only a single ballot for the entire firm. Many of the Admiralty Law Committee members have advised me that they never received a copy of the ballot and were never aware of the fact that the Admiralty Law Committee was considering filing a brief.

2. On the morning of February 12, 1993, the Florida Bar Board of Governors was approached with a request for permission to file an *amicus curiae* brief. The time for responding to the telefaxed ballot had not yet expired.

3. Thereafter, Professor Joshua Morse, Professor of Law at Florida State University College of Law was contacted by The Florida Bar and was told that the Board of Governors of the Florida Bar had authorized him to file an *amicus curiae* brief on behalf of the Admiralty Law Committee. Joshua Morse, a respected Professor of admiralty law at Florida State University, is not a member of The Florida Bar nor the

Committee. He has in the past served as co-counsel with David Paul Horan in cases representing treasure salvors and in particular was co-counsel in the case of Treasure Salvors, Inc. vs. The State of Florida, a case arising out of the discovery of the Spanish sailing vessel ATOCHA.

The brief was drafted by both David Paul Horan and Professor Morse and was typed by Mr. Horan's office. It was then sent to a printer. The printer sent a letter to Professor Morse, requesting that he give them permissions to attach his name for the brief was paid for by Columbus-America Discovery Group, Inc.

4. On February 22, 1993 I spoke with Professor Morse concerning the course of events which led up to the filing of the *amicus curiae* brief. Professor Morse has advised me that if he receives adequate evidence showing that the *amicus curiae* brief was filed without the authorization of the Admiralty Law Committee, he will voluntarily withdraw that brief from the U.S. Supreme Court. On February 23, 1993 we had a subsequent conversation wherein he advised me that he believed that a Chairman of the Committee could authorize the filing of an *amicus curiae* brief without the approval of the Committee.

Based upon the foregoing, I believe the conclusion is unescapable that the Admiralty Law Committee is being utilized by Columbus-America Discovery Group, Inc. to advance their position before the United States Supreme Court. It further appears that the members of the Admiralty Law Committee have not been adequately advised about the contents of the brief to be submitted to the Supreme Court, have not been offered an opportunity to reflect on whether or not the Admiralty Law Committee should take a position on this issue, and that consequently this action should not be taken by the Committee. Under these circumstances, I believe that the only honorable action to be taken by the Executive Board of the Admiralty Law Committee is to withdraw the brief of Professor Joshua Morse from the United States Supreme Court.

I appreciate your assistance in giving this matter your close attention. Should any of you wish to contact me directly, I would be glad to speak to you.

Very truly yours,

/s/ G. J. SULLIVAN, JR.
G.J. Rod Sullivan, Jr.

GJS/cpw
Enc.

[Letterhead of HORAN, HORAN & ESQUINALDO]

February 10, 1993

TO: FLORIDA BAR ADMIRALTY LAW

FROM: DAVID PAUL HORAN

CLIENT/FILE NAME: Admiralty Law Committee—
ROBERT M. JARVIS,
Chairman

TELECOPY TRANSMITTED TO: Current Members of the
Committee

Dear Admiralty Law Committee Member:

On behalf of Chairman Bob Jarvis, this fax is a quest that you indicate any opposition to the filing, by the Admiralty Law Committee, of an *Amicus Curiae* Brief in support of the United States Supreme Court accepting review of a Fourth Circuit Opinion in Columbus America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel (E.D. Va. 1990, 4th Cir. 1992). The Fourth Circuit Opinion narrowly (2-1) overturned a District Court decision awarding the salvor title to all salvage recoveries from an admittedly abandoned vessel. The vessel is the U.S.S. Central America which sank September 12th, 1857. The Fourth Circuit Opinion, while acknowledging that the vessel was abandoned by its owners, concluded that none of the cargo on an abandoned shipwreck was ever "abandoned" within the meaning of federal admiralty law, absent "an owner's express declaration abandoning title". The Court of Appeals split 7 to 5 in denying rehearing and rehearing en banc. The question presented will be a "burden of proof" issue. The question to be presented for certiorari review is whether there is a rebuttable presumption of abandonment as to all salvage from an admittedly abandoned shipwreck.

As usual, "Time is of the Essence" and it is presently intended that unless there is substantial opposition from the members of the Admiralty Law Committee, The *Amicus Curiae* Brief in support of the Supreme Court accepting review will be

filed. By faxing back your reply to Fax No. (305) 294-7822 no late than 3:00 P.M., Friday, February 12th, you may indicate your opposition to the Brief in Support of Review.

Please call David Paul Horan (305) 294-4585 with any questions with regard to this matter.

/s/ DAVID PAUL HORAN,
for ROBERT M. JARVIS

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I OBJECT TO THE ADMIRALTY LAW COMMITTEE FILING THE ABOVE BRIEF

_____
COMMITTEE MEMBER NAME

_____
DATE/TIME